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| Application of: Owens et al. | Date: 20 December 2007 |
| Serial Number: 10/661,157 | Group Art Unit: 3753 |
| Filed: 11 September 2003 | Examiner: Craig M. Schneider |
| Title: "Security Enclosure for a Control Apparatus" | Attorney Docket No.: 8022-A-1 |

Assistant Commissioner for Patents
P.O. Box 1450
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REPLY BRIEF

Dear Sir:

This Reply Brief is filed pursuant to an Examiner's Answer mailed on 1 November 2007 in the matter of the above-identified application.

Status of Claims

Claims 1-20, of which claims 1, 15, and 20 are independent claims, are presented herein. Claims 1, 2, 4, 6, and 8-13 have been rejected, claims 5, 7, and 14 have been objected to, claim 3 has been withdrawn, and claims 15-20 have been allowed. Claims 1-2, and 4-14 are on appeal.

Claims 1, 2, 4, and 6 are rejected under 35 U.S.C. 102(b) as being anticipated by Davenport, U.S. Patent No. 4,890,638 (hereinafter Davenport).

Claims 8-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davenport in view of GuardShack Product Line Brochure, printed in 2000, by Backflow Prevention Device InnClosures (hereinafter GuardShack).

Claims 12-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davenport in view of GuardShack as applied to claim 11, and further in view of Clements et al., U.S. Patent No. 6,203,591 (hereinafter Clements).

Grounds of Rejection to Be Reviewed on Appeal

The 14 June 2006 Office Action rejects claim 1 under 35 U.S.C. 102(b) as being anticipated by Davenport, U.S. Patent No. 4,890,638 (hereinafter Davenport).

The following grounds of rejection are presented for review:

1. Whether independent claim 1 is anticipated under 35 U.S.C. 102(b) by Davenport.

Argument

In the Appeal Brief, the Appellants argued that the rejection of independent claim 1 over Davenport by the 14 June 2005 Office Action was improper. The Office Action asserted that:

- 1) The elongated angle members 106 and 108, components of rectangular frame 105, and the anchor hook 112 of Davenport are together substantially equivalent to the mounting strap claimed by Appellants in independent claim 1;
- 2) The anchor hook 112 of Davenport is of itself substantially equivalent to the mounting shank claimed by the Appellants in independent claim 1; and
- 3) The sheet metal screws or bolts 115 of Davenport are substantially equivalent to the lock device claimed by the Appellants in independent claim 1.

The Appellants believe that these assertions are materially false, and that a true evaluation of Davenport under the guidelines of well established patent law leads to the conclusion that claim 1 is allowable over Davenport.

It should be noted that Davenport refers to item 112 variously as an "anchor hook" and an "anchor member," with "anchor hook" being the dominant appellation. The Examiner's Answer, too, uses the terms "anchor hook" and "anchor member" interchangeably. To avoid confusion, this paper uses the term "anchor hook" throughout, except in cited material.

The first and second assertions of the Examiner's Answer's refer to Davenport FIG. 9. An annotated copy of Davenport FIG. 9 is included herewith in an Appendix A for the convenience of the Board.

With regard to the first and second assertions, the Appellants' Brief argued that a Davenport anchor hook cannot simultaneously be both a mounting shank and a part of a mounting strap, the two items being different and separately claimed in claim 1. The relevant portions of Appellants' independent claim 1 are reproduced here for the convenience of the Board [emphases added] :

...

a mounting member comprising:

*a mounting shank embedded within said base; and
a mounting strap partially embedded within said base and
joined to said mounting shank, and configured to extend inside
said cage substantially perpendicular to said base when said
cage is connected to said base; and*

...

The Examiner's Answer expands the first and second assertions of the Office Action to the following [differential emphases added] :

Davenport discloses...a mounting shank (the middle 112 that is located under where 114 is located in Figure 9) embedded within the base and a mounting strap [106 and the area of 108 that extends from 106 including the left hand side 112 (directly under the 108 in Figure 9) and to the {sic} where the mounting shank connects with 108] partially embedded (the 112 located under 108) within the base and joined to the mounting shank (area of 108 attached to the shank) and configured to extend inside the cage substantially perpendicular to the base when the cage is connected to the

base....

The Examiner's Answer is confusing in this regard. The Appellants have interpreted the bold-underlined emphasized portion to mean that the asserted mounting shank is the anchor hook 112 substantially centrally located in FIG. 9. The Appellants have annotated the appended Davenport FIG. 9 with a circle marked as reference "A" and encompassing what is interpreted to be the asserted mounting shank.

In a similar manner, the Appellants have interpreted the bold-italicized portion to mean that the asserted mounting strap comprises the left anchor hook 112, located directly under "the 108 of FIG. 9" (taken to mean the reference number itself), and that portion of elongated angle member 108 extending from the left anchor hook 112 to the central anchor hook 112, i.e., to the asserted mounting shank. The Appellants have annotated the appended Davenport FIG. 9 with a trapezoid marked as reference "B" and encompassing what is interpreted to be the asserted mounting strap.

The Appellants find the allusions to the Davenport elongated angle 106 to be misleading and confusing, as Davenport FIG. 9 clearly shows that elongated angle member 106 nowhere comes proximate any anchor hooks 112.

The Examiner's Answer is equating one Davenport anchor hook 112 to the Appellants' claimed mounting shank. The Examiner's Answer is then equating another Davenport anchor hook 112 to be a portion of the Appellants' claimed mounting strap. This is illogical. One of ordinary skill in the art would not look at Davenport FIG. 9 and assume that two substantially identical

anchor hooks 112 would serve two different functions.

To propose such an assumption is strong evidence of picking and choosing those portions of Davenport which support the rejection. This is not permitted. As stated in *Ingersoll-Rand Co. V. Brunner & Lay, Inc.*, 1177 USPQ 112, 116 (5th Cir 1973):

Moreover, it is not realistic to pick and choose from any one reference only so much of it as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference fairly suggests to one of ordinary skill in the art.

All the anchor hooks 112 in Davenport are substantially identical and serve the same basic function, that of securing the Davenport device to its base. It would be illogical to expect one of ordinary skill in the art to read Davenport and presume that it is fairly suggested that different anchor hooks 112 would serve different purposes.

That the mounting strap and mounting shank claimed by Appellants in independent claim 1 serve two different functions is evidenced by the fact that they are separately claimed. The mounting strap serves to attach the cage to the base and to the mounting shank embedded therein. The mounting shank serves to prevent the mounting strap and the cage attached thereto from being prized from the base.

That the Examiner's Answer asserts that different ones of the Davenport anchor hooks 112 serve different functions is strong evidence of using the Appellants independent claim 1 as a template to pick and choose the components of Davenport. This

constitutes hindsight, and is not permitted. As stated in *In re Fritch*, 23 USPQ 2d 1780, 1784 (Fed. Cir. 1992):

It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. This court has previously stated that "[o]ne cannot used hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention".

Furthermore, the Appellants' independent claim 1 claims an embedded mounting shank and a partially embedded mounting strap that couples to the embedded mounting shank. Therefore, since the mounting shank is embedded, that part of the mounting strap that is also embedded must be that part of the mounting strap that couples to the mounting shank.

The Examiner's Answer asserts that the left anchor hook 112 and a portion of the elongated member 108 of Davenport together comprise the Appellants' claimed mounting strap, and that the central anchor hook 112 of Davenport singularly comprises the Appellants' claimed mounting shank. Since no part of the Davenport elongated member 108 is embedded with the base, the Examiner's Answer is *de facto* asserting that the two anchor hooks 112 are coupled together. This, of course, is not in keeping with any reasonable understanding of Davenport, where all anchor hooks 112 couple solely to elongated member 108.

Appellants' independent claim 1 requires the coupling to be effected within the base. This requirement results from distinctly claiming that the mounting shank is embedded while the mounting strap is partially embedded. By effecting the

coupling at the surface but outside of the base, the asserted coupling of the Davenport components is not as is claimed in the Appellants' independent claim 1.

Alternatively, since the coupling between the asserted mounting shank and the asserted mounting strap is, by the very structure of Davenport, effected at the surface but outside of the base, then at least a part of the asserted mounting shank is not embedded within the base. This is directly contrary to what is claimed in the Appellants' independent claim 1.

In either case, the Davenport components, as contrary to the assertions of the Examiner's Answer, does not teach what is claimed by the Appellants in independent claim 1. The Examiner's Answer's equation of the mounting strap claimed in independent claim 1 with the central anchor hook 112 of Davenport provides strong evidence of the impermissible use of hindsight.

The Examiner's Answer also asserts that the Appellants should not have further defined the claimed mounting straps in subsequent claims. In the claims under discussion, i.e., in the first line of claims, the mounting straps are recited in claims 1, 2, 4, and 5.

Claim 2 defines the mounting strap as being one of two substantially identical mounting straps joined to a mounting shank. This does not constitute a refinement of the definition of the one mounting strap of independent claim 1. This is equivalent to saying a board is fastened to a stud, and a second similar board is fastened to the same stud. It does not change

the definition of the first board.

Claim 4 defines the mounting straps as being one of two such mounting straps with the mounting shank extending between them. This, too, does not constitute a refinement of the definition of the one mounting strap of independent claim 1, but does constitute a refinement of the definition of the mounting shank thereof. This is equivalent to saying a board is fastened to a stud, a second similar board is fastened to the same stud, and the boards are fastened to the ends of the stud. It does not change the definition of the first board.

Claim 5 defines a width and thickness of the mounting strap, but does not specify what that width and thickness is. This does constitute a refinement of the definition of the one mounting strap of independent claim 1, but does not negate the definition in independent claim 1. This is equivalent to saying a board is fastened to a stud, and the board has a length and a width.

None of these additional claims take away from the fact that the anchor hooks of Davenport bear no resemblance to the mounting strap recited in independent claim 1, as is clearly shown by comparison of the anchor hooks 112 in Davenport FIG. 9 with the claimed mounting straps, for which a preferred embodiment is depicted in the Appellants' FIG. 5. The Davenport anchor hooks 112 are exactly the kind of attachment device the present invention seeks to supplant.

The Examiner's Answer states:

The appellant is arguing that the anchor hooks of Davenport are

disclosed in appellant's disclosure as being a weakness in anchoring the enclosure. The anchors that appellant is pointing out are lag bolt anchors and not the anchor hooks of Davenport. Any enclosure can be compromised if wanted and this is not claimed subject matter that the appellant is arguing.

In the Background section of the Specification, the Appellants state [emphasis added] :

[0011] A third such potential weakness may be the method by which the enclosure is secured. Many such enclosures are secured to a concrete pad. For example, an enclosure secured to a pad by bolts and nuts may be unbolted by application of a suitable wrench if the bolt head or nut is accessible. *Those secured by lag bolts and anchors may simply be pried free* through the use of a good crowbar. Even cast-in or epoxied-in bolts may be snapped free by use of a cold chisel and hammer.

This clearly refutes what the Examiner's Answer states. The Appellants do not at any time point out that the present invention wishes to supplant "lag bolt anchors." Rather, it wishes to supplant securing by "lag bolts and anchors," an entirely different matter. Davenport and the Appellants' specification state precisely what the Examiner's Answer states they do not. What may the Davenport anchor hooks be if not anchors? A clearer statement would be hard to come by.

With regard to the third assertion, the Examiner's Answer asserts that the sheet metal screws or bolts 115 of Davenport are substantially equivalent to the lock device claimed by the Appellants in independent claim 1.

Again, in the Background section of the Specification, the Appellants state [emphasis added] :

[0011] A third such potential weakness may be the method by which the enclosure is secured. Many such enclosures are secured to a concrete pad. *For example, an enclosure secured to a pad by bolts and nuts may be unbolted by application of a suitable wrench if the bolt head or nut is accessible.* Those secured by lag bolts and anchors may simply be pried free through the use of a good crowbar. Even cast-in or epoxied-in bolts may be snapped free by use of a cold chisel and hammer.

As depicted in Davenport FIG. 10, the sheet metal screws or bolts of Davenport most certainly may be removed by application of a suitable wrench or screwdriver. They are, therefore, precisely the type of fastening or "locking" mechanism the Appellants wish to supplant by the present invention.

The Appellants' Brief argued that "lock device" is a coined term, and that the Appellants are permitted to be their own lexicographer.

The Examiner's Answer refutes this, and states:

The Examiner would like to point out that the wording of MPEP 2173.01 states "They can define in the claims what they regard as their invention essentially in whatever terms they choose so long as any special meaning assigned to a term is clearly set forth in the specification" [sic]. This means that "lock device" can be defined in the claim, which it is not, or in the specification, which it is not.

MPEP 2173.01 actually states:

A fundamental principle contained in 35 U.S.C. 112, second paragraph is that applicants are their own lexicographers. They can define in the claims what they regard as their invention essentially

in whatever terms they choose so long as **>any special meaning assigned to a term is clearly set forth in the specification. See MPEP § 2111.01.< Applicant may use functional language, alternative expressions, negative limitations, or any style of expression or format of claim which makes clear the boundaries of the subject matter for which protection is sought. As noted by the court in *In re Swinehart*, 439 F.2d 210, 160 USPQ 226 (CCPA 1971), a claim may not be rejected solely because of the type of language used to define the subject matter for which patent protection is sought.

Contrary to the Examiner's Answer, the Appellants clearly state what a "lock device" is in the Specification. Paragraph [0063] of the Specification states:

[0063] Enclosure 20 includes a **lock device 74 consisting of a lock rod 76 and a lock tab 78**. Cage 28 is secured to base 30 by inserting lock rod 76 through cage and strap lock holes 72 and 70. Lock rod 76 then prevents cage 28 from being lifted away from base 30 and therefore secures apparatus 22 within cage 28. In the preferred embodiment, lock rod 76 is a cold-rolled steel rod approximately 1/2" in diameter, thereby providing a significant deterrent to dislodgment of cage 28.

This definition, written in functional language as allowed by MPEP 2173.01, states clearly and simply what the claimed "lock device" is, what it comprises, and what it does.

In addition, the Applicants intentionally chose the term "lock device" over the more generic and common term "locking device." The word "lock" is not an adjective, it is a noun used as an adjective. Therefore, according to the rules of English grammar, a "lock device" would be "a device for use with a lock." A "locking device," on the other hand, would be "a device that locks." The Appellants' claimed lock device is

intended for use with a lock.

In no way can the sheet metal screws or bolts of Davenport be construed to be equivalent to the Appellants' claimed lock device. To make such an assertion can only be the result of hindsight, which is not allowed.

Conclusion

For the reasons discussed hereinbefore and in the Appeal Brief, the Appellants believe the rejection of independent claim 1 under 35 U.S.C. 102(b) as being anticipated by Davenport to be spurious, illogical, and based primarily upon hindsight. The Appellants believe that the arguments presented fully respond to every outstanding ground of rejection and that the contested independent claim 1 should be found allowable.

Respectfully submitted,



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Appendix A

This Appendix is two pages, including this cover page, and contains an annotated copy of Davenport FIG. 9 for the convenience of the Board.



FIG. 9

